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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: AUG 01 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]
LIN 07 269 50953

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software application and services firm. It seeks to employ the beneficiary permanently in the United States as a Software Engineer, applications, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require an alien of exceptional ability or a member of the professions holding an advanced degree.

On appeal, the petitioner asserts that the director erred. For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."[2]

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[1] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[2] The regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability;

(1) Degree relating to area of exceptional ability;

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4-4B, of the labor certification reflects that a Master's degree in Computer Science or Computer Applications is the minimum level of education required. Part H, line(s) 5 and 6 reflects that no training and no experience in the job offered of Software Engineer, applications, is required. Line(s) 7-7A state that an alternate field of study is acceptable and lists "Electronic, communication, mechanical or computer technology related." Line 8 reflects that an alternate combination of education and experience is acceptable and specifies "other" in line 8-A which asks for the alternate level of education required. Line 8-B states that if "other" is indicated in question

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(2) Letter from current or former employer showing at least 10 years experience;
(3) License to practice profession;
(4) Person has commanded a salary or remuneration demonstrating exceptional ability;
(5) Membership in professional association;
(6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters.

These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. This has not been asserted in this case and the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

8-A, indicate the alternate level of education required. The petitioner states the alternate level of education as, "3 year or 4 year bachelor degree." The number of years of experience acceptable in question 8 is indicated as "5" on line 8-C. Part H, line 9 reflects that a foreign educational equivalent is acceptable.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The director denied the petition based on his determination that specifying a "3 year or 4 year bachelor degree" with five years of experience does not demonstrate that the job offer requires an advanced degree professional.

On appeal, the petitioner maintains that it was the petitioner's intention to accept a 3 year U.S. or foreign bachelor's degree equivalent to a 4-year U.S. bachelor's degree. If this were the case, then the AAO questions why the petitioner specifically stated an alternative of a 3-year or 4-year bachelor's degree. The petitioner subsequently asserts that a "foreign educational equivalent means, a (U.S. or foreign) 3-year bachelor's degree may be considered with the appropriate detailed comparison of credit hours completed with the credit hours required by comparable U.S. Bachelor's programs, and therefore would qualify as a U.S. bachelors degree." The petitioner then gives examples of U.S. bachelor's degrees based on a 3-year *accelerated* programs. The AAO notes that U.S. programs that allow students to work at an accelerated pace possess the same credit hours as a 4-year U.S. bachelor's degree. The petitioner did not specify "accelerated" 3-year programs on the labor certification. Further, it is noted that a copy of an evaluation report, dated November 28, 2005, authored by Tamalene K. Conlen of the Foundation for International Services, Inc., purporting to evaluate the Indian educational credentials of an unrelated individual is not probative of whether the job offer stated on the ETA Form 9089 in this case requires an advanced degree professional. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of the letters as to whether they support the alien's

eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972).

A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Moreover, even as related to degrees from India, the evaluation does not establish that a typical three-year Indian degree is equivalent to a four-year baccalaureate U.S. degree or even an accelerated U.S. program.

As mentioned above, in pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.[3] If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Thus, any foreign equivalent degree must be equivalent to a U.S. baccalaureate. By indicating that a 3-year or 4-year bachelor's degree and five years of experience is acceptable, the petitioner is specifying a lesser academic credential than the equivalent of a U.S. master's degree or its equivalent. Thus, the position does not require a member of the professions holding an advanced degree as required by the regulation at 8 C.F.R. § 204.5(k)(4).

Beyond the decision of the director, the AAO finds that the petitioner did not establish that the beneficiary possessed a Master's degree in Computer Science or Computer Applications or any of the alternate fields of study as claimed on the ETA Form 9089 as of the priority date.[4] The AAO also finds that the petitioner failed to establish its continuing ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (AAO's *de novo* authority well recognized).

The regulation at 8 C.F.R. § 204.5(k)(3)states:

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[3] The petitioner has made no claim that the advanced degree professional visa classification is sought on the basis of the possession of a baccalaureate degree and five years of progressive experience.

[4]The record also would not establish that the beneficiary had a four-year bachelor's degree and five years of progressive experience by the priority date.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner must show that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that it has had the continuing financial ability to pay the proffered wage.[5] *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 9089 was accepted for processing on July 30, 2007, which establishes the priority date.

Part 5 of the preference petition indicates that the petitioner was established in 2004 and has 25 employees.

Part J-11 of the ETA Form 9089 indicated that the beneficiary held a Master's degree in Computer Science and Engineering from North Dakota State University, obtained in 2007. The petitioner failed to submit evidence that the beneficiary was awarded a Master's degree as of the priority date

[5] The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence , such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

of July 30, 2007. Instead, the petitioner submitted a grade transcript of the beneficiary's graduate record from North Dakota State University that indicated a program of graduate study commenced in 2001 with the last listed coursework in the Spring 2006 semester, however, there is no indication that a Master's degree was actually conferred or that he completed all the requirements of the Master's degree program. A letter, dated April 18, 2007, from the graduate program coordinator was also submitted. It indicates that the beneficiary was taking a job that would interrupt his coursework toward a Ph.D., but that the department of computer science looked forward to the beneficiary's rejoining the Ph.D. program. [6]

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport,* 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses in intention to the contrary. *Int'l Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB,* 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR,* 930 F.2d 975 (2d Cir.), *cert. denied,* 112 S. Ct. 416 (1991).

Additionally, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). We are to contstrue the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.,* 486 U.S. 281, 291 (1988)(holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also Coit Independence Joint Venture v. Federal Sav. And Loan Ins. Corp.,* 489 U.S. 561 (1989); *Matter of W-F-,* 21 I&N Dec. 503 (BIA1996).

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). We find that for the purpose of seeking a visa classification pursuant to section 203(b)(2) of the Act, the plain and ordinary meaning of "holding an advanced degree" means the actual conferral of such a degree from an accredited United States college or university or a foreign equivalent degree. We see no indication that the legislative intent included any other construction other than the actual award of such a degree. As the petitioner failed to establish that the beneficiary was awarded an advanced degree as of the priority date of July 30, 2007,[7] the petitioner failed to demonstrate that the beneficiary qualified for the certified position.

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[6] The petitioner filed a second immigrant petition on the beneficiary's behalf on March 18, 2010. Documents submitted with that filing show that North Dakota State University issued the beneficiary a Master's degree in Computer Science on August 7, 2009, subsequent to the priority date in this matter.

[7] While the record contains the beneficiary's provisional certificate for a Bachelors of Engineering degree in Computer Science and Engineering, the document is dated July 31, 2001. The beneficiary then began his Master's studies in the fall of 2001. Form I-20s for the beneficiary's F-1 status lists

Even if the labor certification properly required an advanced degree professional and established that the beneficiary possessed the required advanced degree, which as set forth above, is not the case here, we note that the petitioner has not established its continuing financial ability to pay the proffered wage as of the priority date of July 30, 2007. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.[8] The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

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some curricular practical training authorized from May 17, 2004 to June 15, 2004, and then from July 4, 2004 to November 1, 2004, and later from May 21, 2007 to August 19, 2007. His forms also reflect Optional Practical Training from May 7, 2005 to May 6, 2006. On ETA Form 9089, the beneficiary lists his experience as:

1. Employer; [redacted]
   Job Title; Programmer Analyst
   Dates: January 6, 2006 to June 1, 2006
2. Employer; [redacted]
   Job Title; Developer
   Dates; October 15, 2005 to December 5, 2005
3. Employer; [redacted]
   Job Title; Programmer
   Dates; March 7, 2005 to July 20, 2005
4. Employer; [redacted]
   Job Title; Developer
   Dates; May 17, 2004 to November 1, 2004

Nothing demonstrates that the beneficiary has five years of full-time progressive experience following his bachelor's degree to meet the regulatory stated equivalent of an advanced degree, even if the labor certification be interpreted to require an advanced degree professional, which as set forth above, it does not.

[8] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of July 30, 2007.

In support of its continuing ability to pay the proffered wage of $43,000 per year as set forth on the ETA Form 9089, the petitioner submitted a copy of an Internal Revenue Service (IRS) transcript for 2004, a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004 and 2005, and copies of a third party payroll services provider's records of filing Form 941, Employer's Quarterly Tax Return for 2006 on behalf of the petitioner. No financial information relevant to 2007, the year of the priority date, was provided. The ETA Form 9089, signed by the beneficiary on August 8, 2007, does not indicate that he has worked for the petitioner.[9]

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[10] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18 of a corporate tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[11] The record indicates that in 2005, the petitioner's net income was -$18,224 and its net current assets

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[9] The 2005 Form 1120 reflects a tax return filed by a C corporation. On this form, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[10] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[11] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

were $60,689. As noted above, however, the petitioner has not submitted any financial information relevant to 2007, the year of the priority date. Therefore, the petitioner's 2005 corporate income tax return is of limited probative value to establish the petitioner ability to pay the proferred salary from July 30, 2007 onward.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding

> depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As mentioned above, the petitioner submitted no financial information relevant to its net income or net current assets in 2007. Further, the petitioner's quarterly employer's tax return information for 2006 does not provide information relevant to the petitioner's net income or net current assets. Additionally, it is noted that the petitioner has filed immigrant and non-immigrant petitions for multiple beneficiaries. Current USCIS records, as of June 24, 2011 reflect that the petitioner has filed at least 158 petitions, including 140 Form I-129 petitions, with the remaining being Form I-140 petitions, all of which have been filed since 2007. The petitioner has submitted no information relevant to the respective proffered wages, the payment of wages, employment status and priority dates of other sponsored beneficiaries. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In addition to the lack of specific information relevant to the petitioner's net income and net current assets from the priority date onward, the petitioner's ability to pay this beneficiary has not been established, because no information has been provided relevant to the other sponsored beneficiaries. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As discussed above, the petitioner failed to provide any information through federal income tax returns, audited financial statements, or annual reports for 2007 onward that would demonstrate that either the petitioner's net income or net current assets could cover the proffered wage of $43,000 per year. The petitioner also failed to provide any evidence relevant to the other beneficiaries that it has sponsored. Without such evidence it may not be concluded that the 2004 and 2005 federal income tax returns or 2006 Form 941 quarterly return information herein submitted represent the kind of framework of profitability such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual and unique business or reputational circumstances exist in this case, which are analogous to the facts set forth in that case. As no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2007, the year of filing, was an uncharacteristically unprofitable year for the petitioner, the petition may not be approved on these grounds.

The petitioner has failed to establish that the job offer set forth on the labor certification required an advanced degree professional. Beyond the decision of the director, the petitioner also failed to demonstrate that the beneficiary possessed the educational credentials required by the certified position as of the priority date and that the petitioner had the continuing financial ability to pay the proffered wage from the priority date onward. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.